IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-1057

UNITED STATES OF AMERICA,
Petitioner,

v.

DOMINIC NICHOLAS GIORDANO, *et al.*,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT GIORDANO

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As permitted by Rule 40(3) of the Rules of the Supreme Court of the United States, this brief for the Respondent Giordano shall not contain: a reference to the official reports of the opinions delivered in the courts below; statement of jurisdictional ground; questions presented; statutes involved, nor a statement of the case.

SUMMARY OF ARGUMENT

I

The record in this case shows that the wiretapping of the telephone of the Respondent Giordano conducted under Title III of the Omnibus Crime Control and Safe

Streets Act of 1968 was fatally defective because the Government willfully adopted an authorization procedure that violated §2516(1) of the Act. The Government, moreover, willfully failed to correctly identify in the application for the wiretap the official who authorized the same, as required by §2518(1)(a). This thereby produced a similar incorrect identification in the interception order, contrary to the requirements of §2518(4)(d). In a criminal prosecution brought in the U.S. District Court against the respondent and others based principally on the contents of the wiretaps, the Court, upon the motion of the defendants, suppressed the wiretap evidence and its derivatives for violations of the identification requirements in the application and the order. *United States v. Focarile*, 340 F. Supp. 1033 (D.C. Md. 1972). The Circuit Court, upon review, perceived that violation of the authorization requirement was more controlling; and affirmed the District Court result in this case. *United States v. Giordano*, 469 F.2d 522 (4th Cir. 1972). Both Courts deemed that suppression was warranted by the remedy and sanction provisions of the Act, §§2515, 2518(10)(a)(i) and (ii).

The provisions of Title III breached by the Government in this case were "protective procedures" enacted by Congress to implement the Fourth Amendment values inherent in the Act. The plain wording and the legislative history of these provisions indicate they are central to the portions of the Act, which were responsive to the constitutional requirements enunciated in *Berger v. New York*, 388 U.S. 41 (1967), *Katz v. United States*, 389 U.S. 347 (1967). The vast majority of lower Federal Courts which have dealt with the same questions in this case upon identical facts, have reached the same results as the lower Courts here.

It is not necessary to identify the "protective procedures" created by the sections in the Act dealing with authorization and identification as related to safeguarding Fourth Amendment rights in order to justify the suppression orders of the Courts below. The remedy and sanction provisions of the Act, noted above, read together clearly provide the authority for suppression.

Section 2515 of the Act provides essentially that no part of the contents of a wire interception nor evidence derived from it may be received in evidence in any trial if the disclosure of that information would be in violation of the Act. Section 2518(10)(a)(i) and (ii), provide that an aggrieved person may move to suppress if the communication was unlawfully intercepted or if the order under which the interception was made is insufficient on its face. Indeed, these provisions mandate suppression. The Act, in terms of remedy, is self-executing. Again, the plain wording of these provisions, their legislative history, and the judicial interpretations unquestionably support this conclusion.

The major argument that the Government makes against suppression in this case is based upon two faulty premises: (1) that suppression of evidence in a criminal case is a judicially created rule of exclusion; and (2) that this rule should be invoked only in cases where there have been violations of constitutional rights, or rights of constitutional magnitude. The fundamental flaw in the first part of this reasoning is that the basis for the suppression ordered in this case was not a rule created by the Court, but the explicit remedy provisions of the Act. This being so, the weakness in the second premise of the Government is apparent. Since the Act contains remedy and sanction provisions, the magnitude of the violation warranting their application need not be of constitutional magnitude. It matters not that the Govern-

ment's screening and review procedures were extensive in this case. The procedures utilized were not in compliance with the provisions of the Act.

Advancement by the Government of "other considerations"—correction of the previously defective authorization and identification procedures, the non-applicability of this Court's retroactivity doctrine, and the inability to maintain future prosecutions based on wiretap evidence gathered through defective procedures—as a basis for reversal of the suppression sanctions imposed by the lower courts, are all legally insubstantial.

II

The Government next argues broadly that the authorization and identification procedures followed in this case complied with the requirements of the Act. Section 2516(1) of the Act requires that the Attorney General, or an Assistant Attorney General, specially designated by the Attorney General, authorize an application for an order authorizing interception of wire communications. Sections 2518(1)(a) and 2518(4)(d), respectively, require that the application and the order identify the officer authorizing the application. When the application in this case reached the Office of the Attorney General he was away. Sol Lindenbaum, his Executive Assistant authorized the application. He affixed the Attorney General's initials to a memorandum directed to Will Wilson, as Assistant Attorney General, which purported to be a designation to Wilson to authorize the application. A letter was addressed to the supervising attorney in this case, Francis S. Brocato, which appeared to be from Will Wilson authorizing the application. Will Wilson did not sign the letter. Will Wilson did not ever see any of the papers in the case. The application and the interception

order recited that Will Wilson was the official who authorized the application pursuant to a proper designation from the Attorney General. The interception of wire communications from the telephone of the respondent Giordano, under the order, was for 21 days. In no respect were the provisions of the Act concerning authorization and identification complied with by the Government in seeking or obtaining the interception order. Later, an application for authority to extend the interception order was processed by the Government. The contents of the initial interception comprised a substantial and material part of the probable cause asserted in the moving papers for the extension order. In connection with this request for an extension, the Attorney General initialed a memorandum directed to Assistant Attorney General Will Wilson in which he specially designated Wilson to authorize this request. A letter purportedly from Wilson was sent to the supervising attorney, Brocato, advising him that in accordance with 2516(1), the Attorney General had specially designated him to authorize the extension request and he (Wilson) was in fact doing so. This was not correct. The application repeated the incorrect representation that Wilson was the official who had authorized it. The order that was entered by the Court authorizing the wiretap extension incorrectly identified Wilson as the official who had authorized the application.

In this Court the Government renews its argument that Sol Lindenbaum was the "alter ego" of the Attorney General with respect to wiretap applications. Additionally, the Government again argues that 2516(1) did not preclude entirely the application of 28 U.S.C. 510. This statute gives the Attorney General the right to make provisions authorizing the performance by any other officer, employee, or agent of the Justice Department of

any of his functions. The Circuit Court opinion effectively lays to rest the "alter ego theory" advanced by the Government. The legislative history of §2516 spells out the Congressional intent to limit the initiation of a wiretap authorization to "a publicly responsible official, subject to the political process." Mr. Lindenbaum is not an official "subject to the political process." The argument of the Government based on 28 U.S.C. 510 is dispatched by a consideration of the rules of statutory construction. Sec. 2516(1) is narrow, specific, and limited in its terms. A general, permissive statute cannot be read so as to broaden it. Specific terms must prevail over general ones in the same or another statute which otherwise might be controlling. The enumeration of certain things in a statute implies the exclusion of all others. 28 U.S.C. 510 was in existence prior to the enactment of Title III, and is in an entirely different section of the United States Code. Centralization of policy and responsibility were important purposes to be accomplished by Section 2516, as were also the limitation on the kind and number of officials who could exercise the authorization function.

The Government attempts to justify the identification defects in the application and the order by asserting that the spirit, if not the letter, of the law was met. The identification requirements demand strict compliance. They cannot be ignored or overlooked on the theory that they are not of constitutional dimension. It does not matter, as the Government argues, that misidentification does not taint the Court's finding of probable cause and necessity. The answer to these contentions is that the procedures adopted by the Government in utilizing Title III must pass both constitutional and statutory tests of compliance.

III

The Government argues finally that the evidence gathered by the extension order is admissible and should not have been suppressed. This argument is specious. The moving papers for the extension order showed that a substantial and material basis of the showing of probable cause for further wiretapping was the contents of interceptions made under the initial defective wiretap. The District Court so found. The application for the extension order contained many of the defects existing in the initial one. Unquestionably, there was a misidentification of the official who authorized the application. The affidavit of Sol Lindenbaum states that it was the Attorney General who did so. The application and order recites that Will Wilson authorized the application. Will Wilson did not sign the authorization. The extension application and order were as infirm in terms of the identification requirements as were the initial ones.

ARGUMENT

I.

IN THIS CASE SUPPRESSION OF THE EVIDENCE GATHERED BY A WIRE INTERCEPTION CONDUCTED UNDER TITLE III IS MANDATED BY THE SEVERAL AND SUBSTANTIAL VIOLATIONS OF THE REQUIREMENTS OF THE STATUTE CONCERNING AUTHORIZATION AND IDENTIFICATION.

In its brief for this Court the Government has rearranged the order of its attack. Reversing the presentation it made in the Circuit Court, the Government here postpones offering arguments to justify the flawed authorization and identification procedures it employed in seeking and obtaining the initial wiretap of

the petitioner Giordano's telephone. The Government prefers to first lay before this Court its contention that suppression of the evidence gathered by a wiretap[1] is a drastic remedy to apply where the authorization requirements (§2516(1))[2] and the identification requirements (§2518(1)(a) and (4)(d))[3] of Title III have not been complied with. We propose to deal with the Government's arguments in the order in which they are made. It is obviously difficult to speak first to the question of whether the remedy, so to speak, fits the wrongdoing,

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[1] The interceptions of wire communications conducted in this case were done under the provisions of the Omnibus Crime Control and Safe Streets Act of 1968, Title III, 18 U.S.C. 2510-2520, hereinafter called "Title III", or the "Act".

[2] Title 18 U.S.C. §2516(1) provides, *inter alia*:

"The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for . . . an order authorizing or approving the interception of wire or oral communications. . . ."

[3] Title 18 U.S.C. §2518 provides in part:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

"(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

* * *

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify–

* * *

"(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; . . ."

when issues concerning the nature of the wrongdoing are to be dealt with secondly. It is thus indicated that a brief synopsis of the operative facts be set forth.

During the month of September and going into early October 1970, the Baltimore office of the Bureau of Narcotics and Dangerous Drugs (Department of Justice), was conducting an investigation into the alleged narcotics trafficking of the petitioner, Dominic Giordano and others. Shortly before the middle of October a decision was reached by the Bureau and the Office of the United States Attorney to seek a Title III wiretap order from the United States District Court for the District of Maryland for Giordano's home telephone.[4] Papers for that purpose were prepared, consisting of: (1) an application by Francis S. Brocato, Assistant United States Attorney, who was the supervising attorney in the investigation (App. 21-25); (2) affidavit of Wayne A. Ambrose, a special agent of the BNDD, who was in charge of the investigation (App. 26-46); (3) the affidavit of Abraham L. Azzam, a Group Supervisor of the BNDD, who was Agent Ambrose's supervisor (App. 47-48); and (4) a proposed order authorizing the interception. This "package" was forwarded to the Department of Justice for processing, review and ultimately for authorization by the Attorney General[5] or by an Assistant Attorney General specially designated by him, in accordance with §2516(1) (see footnote 2). The affidavit of Harold P.

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[4] Telephone number 301-685-0211, located at (App. 24) 8 Charles Plaza, Apartment 1304, Baltimore, Maryland. This was the telephone number of Giordano's apartment on October 16, 1970. Later during the period (App. 55) material in this case, it was changed to 301-685-2332.

[5] The Honorable John N. Mitchell, Esquire was the Attorney General at the time.

Shapiro, Deputy Assistant Attorney General, Criminal Division, describes the processing of these papers within the Division, the favorable recommendation given to the application at the various levels at which they were reviewed, and the forwarding of them to the Office of the Attorney General (App. 100-101). On October 16, 1970, when the papers reached the Office of the Attorney General, he was "on a trip away from Washington, D.C." (affidavit of Sol Lindenbaum, Executive Assistant of the Attorney General, App. 96-97, at p. 97). His Executive Assistant, Mr. Sol Lindenbaum, "reviewed the submitted material and concluded that the request in this case satisfied the requirements of the statute." *id.* He also concluded, from his "knowledge of the Attorney General's actions on previous cases, that he would approve the request if submitted to him." *id.* Sol Lindenbaum "approved the request," *id.*; that is, he authorized the application. (§2516(1)) He caused the Attorney General's initials to be placed on a memorandum to Will Wilson,[6] Assistant Attorney General. "The memorandum . . . approved a request that authorization be given to Francis S. Brocato to make application for an interception order." *id.* A letter was prepared to Mr.

[6] The memorandum, dated October 16, 1970, was from John N. Mitchell, Attorney General, to Will Wilson, Assistant Attorney General, Criminal Division, and read as follows:

"Subject: *Interception Order Authorization*

"This is with regard to your recommendation that authorization be given to Assistant United States Attorney Francis S. Brocato, District of Maryland, to make application for an Order of the Court under Title 18, United States Code, Section 2518, permitting the interception of wire communications for a twenty-one (21) day period to and from telephone number 301-685-0211, located at 8 Charles Plaza, Apartment 1304, Baltimore, Maryland, in connection with the investigation into possible violations of Title 21, United States Code, Section 174 and 26 United States Code,

Brocato purportedly from Mr. Wilson, which, on account of its importance in this case, is substantially here set out in full:

"This is with regard to your request for authorization to make application pursuant to the provisions of Section 2518 of Title 18, United States Code, for an Order of the Court authorizing the Federal Bureau of Narcotics and Dangerous Drugs to intercept wire communications to and from telephone number 301-685-0211, ...

"*I have reviewed your request and the facts and circumstances detailed therein and have determined that probable cause exists to believe that Nicholas Giordina* (sic) *and others as yet unknown have committed, are committing, or are about to commit offenses enumerated in Section 2516 of Title 18, United States Code, ... I have further determined that there exists probable cause to believe that the above person makes use of the described facility in connection with those offenses, that wire communications concerning the offenses will be intercepted, and that normal investigative procedures reasonably appear to be unlikely to succeed if tried.*

"Accordingly, *you are hereby authorized under the power specially delegated to me in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, pursuant to the power conferred on him by Section 2516 of Title 18, United States Code, to make application to a judge of competent jurisdiction for an Order of*

Sections 4704(a), 4705(a) and 7237(a) and (b) by Nicholas Giordina and others as yet unknown.

"Pursuant to the powers conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially designated to exercise those powers for the purpose of authorizing Francis S. Brocato to make the above-described application." (App. 98).

the Court pursuant to Section 2518 of Title 18, United States Code, authorizing the Federal Bureau of Narcotics and Dangerous Drugs to intercept wire communications from the facility described above, for a period of twenty-one (21) days." (App. 25-26). (Emphasis supplied).

In the record of this case it is conceded that Mr. Wilson did not sign the letter.[7] In fact there is no evidence that he even knew of its existence, or had any knowledge of any of the facts contained therein.[8] Mr. Brocato's

[7] At a hearing in the District Court in this case upon the defendant's motion to suppress the contents of the intercepted wire communications on account of the statutory violations here involved, the Assistant U.S. Attorney (Mr. Brocato) said to the Court in response to its question:

"MR. BROCATO: Well, the office of the–The problem here, Judge, is that I can't tell you who signed it. *I know that Will Wilson personally made none of those determinations,* but indeed with regard to the Court's reasoning in this case, that would apply to every Title 3 throughout the United States, because *Will Wilson made no determinations at any point,* and it's very surprising if you find a letter which was signed by Will Wilson. In fact, we were trying to find out–I recall personally when we were trying to find out who signed the Will Wilson letter, and they indicated maybe Will Wilson signed it, and everyone laughed. And they had to find an actual piece of paper which was signed by Will Wilson, which was awfully difficult to find, but finally they did, but it wasn't Will Wilson who had signed that letter. . . ." (App. 106). (Emphasis supplied).

[8] Pursuant to the remand ordered by the Fifth Circuit in *United States v. Robinson,* 472 F.2d 973 (5th Cir. 1973), an evidentiary hearing was held before Justice J. Mehrtens (S.D. Fla.) in a cluster of cases (referred to in Pet's. brief, *United States v. Marder,* p. 5, n.2) on March 19, 20, 1973 to take testimony from the various government officials involved in the authorization, screening, and review procedures in the Justice Department of Title III applications. Will Wilson testified at his hearing. On cross-examination, he said he occasionally saw the authorization memorandum from the Attorney General (Tr. 261). As to the so called "Will Wilson letter", he said

application (with attachments and exhibits) was submitted to Chief Judge Northrop of the District Court on October 16, 1970. Paragraph 2 of the application is significant here:

> "2. *Pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable John N. Mitchell, has specially designated in this proceeding the Assistant Attorney General of the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, to authorize affiant to make this application for an order authorizing the interception of wire communications. The letter of authorization signed by the Assistant Attorney General is attached to this application as Exhibit A.*" (App. 22). (Emphasis supplied).

Attached to the application as Exhibit A was the Will Wilson letter, *supra* as well as the affidavits of Agent Ambrose, *supra,* and Group Supervisor Azzam, *supra*. A proposed order was also submitted to the Court. The proposed order, which was signed by Judge Northrop (App. 49-51), provided in part as follows:

"Wherefore, it is hereby ordered that:

> "Special Agents of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, are authorized, pursuant to application

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he did not know they were being submitted to United States District Courts. In fact, he "did not know exactly what was made of them." (Tr. 261) He did not know that Mr. Lindenbaum was signing the Attorney General's initials to the designation memos. He did not know that anyone other than the Attorney General authorized the wiretaps (Tr. 263). The Attorney General never granted him authority to approve applications for a wiretap (Tr. 266).

authorized by the Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, who has been specially designated in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, to exercise the powers conferred on him by Section 2516 of Title 18, United States Code, to:

"(1) intercept wire communications of Nicholas Giordina (sic). . . ." (App. 50-51).

Pursuant to the order, wire communications were intercepted over the subject telephone of the petitioner Giordano for a period of 21 days.

The facts, without comment or elaboration, make it clear that in this case there were compound violations of Title III in the authorization requirement (§2516(1)) and in the identification ones (§2518(1)(a) and (4)(d)). This case represents a situation where Sol Lindenbaum, the Executive Assistant to the Attorney General,[9] approved the authorization and some unknown person

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[9] "The Executive Assistant to the Attorney General is not an office created by statute as is the Deputy Attorney General or the nine Assistant Attorneys General who are appointed by the President by and with the advice and consent of the Senate, to assist the Attorney General in the performance of his duties, 28 U.S.C. §§504, 506. Rather it is a post established in the Dept. of Justice by administrative regulation to assist the Attorney General in various matters submitted for the Attorney General's action and perform such other duties and functions as may be specially assigned from time to time by the Attorney General. 28 C.F.R. ¶0.6." *United States v. Cihal*, 336 F. Supp. 261, 263, n.1 (W.D. Pa., 1972).

In some of the cases, Lindenbaum, in placing the Attorney General's initials on the memorandum, acted ". . . under oral instructions by Mitchell [the Attorney General] after a long distance telephone conference with [him]." *United States v. Laff*, ___ F. Supp. ___ (S.D. Fla., 5-31-73) (No. 70-450 Cr. P.F.); *United States v. Vasquez*, 348 F. Supp. 532 (C.D. Cal. 1972).

signed Will Wilson's name to the authorization. The authorization letter (of Will Wilson) to Assistant United States Attorney Brocato represented that the Attorney General had specially designated him (Wilson) to authorize the application; and that Wilson had done so. As had been shown, these representations were not true. The application of Brocato, filed in the District Court, reiterated these false statements. These erroneous statements of authorization and identification were further repeated in the order.[10] The District Court (Miller, J.) upon ascertaining these facts, determined that the violations of the identification requirements (§2518(a)(1) and (4)(d)) justified suppression of the contents of the wiretap and of all evidence derived from it. (*United States v. Focarile, supra.*) The approach by Judge Sobeloff of the Circuit Court was different. (*United States v. Giordano, supra.*) He found that the authorization violation (§2516(1)) was the principal one and concluded that it, along with the others, were grave enough to warrant suppression to the same extent as that ruled by the District Court. Where the exact combination of these violations have appeared factually, the majority of Federal Courts have decreed suppression.[11]

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[10]This conglomeration of false and misleading statements in the documents has been characterized by the Ninth Circuit as a "paper charade", *United States v. King*, 478 F.2d 494 (9th Cir. 1973); and, "button, button, whose got the button", *United States v. Chavez*, 478 F.2d 512 (9th Cir. 1973).

[11]*United States v. Robinson*, 468 F.2d 189 (5th Cir., 1972) and later opinion, 472 F.2d 973 (en banc); *United States v. Mantello*, 478 F.2d 671 (D.C. Cir., 1973); *United States v. King*, 478 F.2d 494 (9th Cir., 1973); *United States v. Roberts*, 478 F.2d 1405 (7th Cir., 1973); *United States v. Fox*, 349 F. Supp. 1258 (S.D. Ill., 1972); *United States v. Wierzbicki*, 12 Cr.L.R. 2075 (E.D. Mich., Sept. 15, 1972); *United States v. Narducci*, 341 F. Supp. 1107

Later, on November 6, 1970, an application for extension of the interception order was made to the District Court and was approved.[12]

(E.D. Pa., 1972); *United States v. Aquino*, (with respect to extension order) 338 F. Supp. 1080 (E.D. Mich., 1972); *United States v. Baldassari*, 338 F. Supp. 904 (M.D. Pa., 1972); *United States v. Cihal, supra* note 9.

[12]The Attorney General personally initialed a memorandum to Will Wilson, Assistant Attorney General, captioned "Interception Order Authorizing Extension." (App. 98-99). The said memorandum provided in part:

> "Pursuant to the power conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially delegated to exercise that power for the purpose of authorizing Francis S. Brocato to make the above-described application." (App. 99).

Sol Lindenbaum's affidavit (App. 96-97) stated that in regard to this request for authorization to make application for an extension order, the Attorney General approved the request (App. 97). Another Will Wilson letter of authorization was directed to Mr. Brocato in connection with the extension application (App. 64). This letter contained all the false and misleading representations of personal review, etc., as was set forth in the letter of October 16, 1970. The letter also revealed that the authorization to extend the wiretap was from Will Wilson, "under the power specially delegated to me [Will Wilson] in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, pursuant to the power conferred on him by Section 2516 of Title 18, United States Code. . . ." (App. 65). This representation conflicts with the affidavit of Shapiro that the Attorney General approved the request. The order of extension falsely identified Will Wilson as the official who authorized the extension application (App. 83). Many of the cases that have viewed the action of the Attorney General placing his initials on such a memo have considered that tantamount to a proper authorization under Section 2516(1). See Govt's. brief p. 33, n.22. The rationale of such holdings, according to J. Sobeloff, is: "the fact that the judge may have been told that

A. The provisions of Section 2516(1) and 2518(1)(a) and (4)(d) prescribe procedures that are protective of and directly related to the Fourth Amendment values of Title III, such that a violation of them warrants suppression of the contents of wire interceptions and evidence derived therefrom.

To facilitate the argument that suppression of evidence is a drastic remedy, the Government concedes arguendo the complex of statutory violations found by the two courts below (Pet's. Brief, p. 29); but it takes the position that these breached requirements are not central to Fourth Amendment values[13] and that the sanction for

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Will Wilson rather than Mitchell was the source of the authorization was a matter of form, not substance." 469 F.2d at p. 530.

A few cases have reached the conclusion that even if the Attorney General did initial a similar memo to Will Wilson, and thereby authorize the application, the failure of the application and the order to identify him as the authorizing official as required by 2518(1)(a) and (4)(d) rendered the interception defective. *United States v. Chavez, supra* note 10; *United States v. Boone,* 348 F. Supp. 168 (E.D. Va., 1972). We leave this conflict and contrariety in the cases as we find it. For in this case if the initial interception falls, then the evidence gathered by the extension order must also fall as "fruit of the poisonous tree." *Nardone v. United States,* 308 U.S. 338, 341 (1939).

[13]In the Government's conceptualism the statute deals with at least two distinct groups of rights: (1) "those that incorporate Fourth Amendment concerns" (Pet's. brief p. 31), otherwise labeled "the right of privacy provisions" (Pet's. brief p. 31); and (2) those that have to do "with Congress' desire to ensure uniformity of policy and political responsibility." (Pet's. brief p. 30). The Government's argument runs that the provisions of Title III are indeed capable of this division because the first group "derives directly from this Court's opinions in *Berger* [*Berger v. New York,* 388 U.S. 41] and *Katz* [*Katz v. United States,* 389 U.S. 347] while the latter finds no counterpart there" (Pet's. brief p. 31). This court in *United States v. United States District Court,*

disregarding them should be something other and less than suppression of the evidence gathered by the wiretap. The Government thus seeks to classify the provision of Title III into categories or levels of rights; some it deems to be equivalent to traditional Fourth Amendment concerns and others are not. The plain answer to this is that nothing in the statute, the congressional findings or history, nor the judicial interpretations, permits such gradations. No authoritative data supports the Government's theory of separateness. The contrary, we will show, is the fact.

In *Berger v. New York, supra,* this Court held the New York permissive eavesdrop statute (N.Y. Code Crim. Proc. §813-a) to be unconstitutionally broad in its sweep "resulting in a trespassory intrusion into a constitutionally protected area" and thus violative of the 4th and 14th Amendments. This Court condemned the New York statute's "blanket grant of permission to eavesdrop . . . without adequate judicial supervision or *protective procedures.*" 388 U.S. at p. 60 (emphasis supplied). Title III represents the effort of Congress "to structure a limited system of wire surveillance and electronic eavesdropping within the framework of the 4th Amendment and the guidelines of *Berger, Katz* and other Supreme Court decisions for use by law enforcement officers in fighting crime." *United States v. Scott,* 331 F. Supp. 233, 239 (D.D.C. 1971). The provisions of the statute "track the constitutional requirements of particularity, judicial restraints and supervision, *and the other protective procedures outlined by the Supreme Court* in *Berger* and *Katz.*"

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407 U.S. 297 (1972) implicitly disavowed that "*Katz* sought to set the refined requirements for the specified criminal surveillances which now constitute Title III." 407 U.S. 323.

id. (emphasis supplied). Although the authorization requirement of 2516(1) and the mandate in 2518(1)(a) for identification in the application (of the officer authorizing it) and a similar requirement by the terms of 2518(4)(d) for identification in the order are not specifically spelled out in *Berger, Katz,* and the other judicial precursors to Title III, they are unquestionably "protective procedures". These procedures[14] are so intricately a part of the basic 4th Amendment requirements of the statute that they cannot be subordinated to the constitutional values that they implement.[15] The legislative history tells us this, as well as the thoughtful pronouncements of the majority of the Federal Judiciary who have confronted the particular statutory violations here involved.

A detailed history of §§2516(1), 2518(1)(a) and (4)(d) is given by the District Court (Miller, J.) in this case. *United States v. Focarile, supra;* and,

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[14]"When matters of a person's privacy are involved, the Government should be required to adhere to the dictates of Congress. The citizen's right to be left alone demands strict compliance with the letter of this legislative proviso." *United States v. Fox, supra* note 11.

[15]Judge Sobeloff, writing for the Court below (4th Circuit) in the instant case (*United States v. Giordano,* 469 F.2d 522 (4th Cir. 1972)) described the entire scheme of the act in the opening of the opinion: "Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 et seq. ['Act'], lays down a *stringent step-by-step procedure* that circumscribes and limits all electronic surveillance. . . ." *id.* at 523 (Emphasis supplied.) See also *United States v. Baldassari, supra* note 11 at p. 906; *United States v. Cihal, supra* note 9 at p. 266. Toward the end of his opinion, to emphasize the point, Judge Sobeloff said: "The statute imposes an overall ban on electronic surveillance except under certain circumstances pursuant to specific procedures–which are not mere technical steps along the way." 469 F.2d at p. 531.

see also the Circuit Court opinion, *United States v. Giordano, supra,* at pp. 526-527. Remarkably, the present wording of 2516(1), restricting the authorization to the Attorney General or to an Assistant Attorney General specifically designated by him, was first suggested by Herbert J. Miller, then Assistant Attorney General, Criminal Division, Department of Justice, in testimony given in May 1961 at hearing on S. 1495[16] before the *Subcommittee on Constitutional Rights of the Committee on the Judiciary, Wiretapping and Eavesdropping Legislation.* He testified that the Department felt that the authorization provision in S. 1495 was too broad (see footnote 16) and suggested that the range of officials who might authorize wiretaps be severely curtailed. In part, he said:

> "I suggest that the bill should confine the power to authorize an application for a court order to the Attorney General and any Assistant Attorney General whom he may designate. This would give greater assurance of a responsible executive determination of the need and justifiability of each interception."

Shortly, thereafter, on June 21, 1961, the Department of Justice submitted to Congress a proposed revision of S. 1495 which, for the first time, included precisely the same operative language as the present §2516(1). The language of this recommendation was incorporated in all

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[16]S. 1495 was presented in the 87th Congress, 1st Session, in 1961. Section 4(b) of the bill, as originally proposed provided that:

> "The Attorney General or any officer of the Department of Justice or any United States Attorney specially designated by the Attorney General, may authorize an investigative law enforcement officer of the United States or any Federal Agency to apply to a judge of competent jurisdiction for leave to intercept wire communications."

subsequent proposals and became part of S. 917 which contained the text of Title III as it was eventually enacted by the Congress. Senate Report 1097 (United States Code Congressional and Administrative News, 90th Congress 2nd Session, Vol. 2 (1968)) in referring to §2516(1) states:

> "Paragraph (1) provides that the Attorney General, or any Assistant Attorney General of the Department of Justice specifically designated by him, may authorize an application for an order authorizing the interception of wire or oral communications. This provision centralizes in a publicly responsible official subject to the political process the formulation of law enforcement policy on the use of electronic surveillance techniques. Centralization will avoid the possibility that divergent practices might develop. Should abuses occur, the lines of responsibility lead to an identifiable person. This provision in itself should go a long way toward guaranteeing that no abuses will happen." 1968 U.S. Code Cong. & Adm. News p. 2185.

In *Gelbard v. United States*, 408 U.S. 41 (1972), this Court was not faced with any of the questions involved in this case, nor with the construction of Title III; but it did, however, indicate that the Act, "authorizes the interception of private wire and oral communications, but only when law enforcement officials are investigating specified serious crimes and receive prior judicial approval, *an approval that may not be given except upon compliance with stringent conditions.* 18 U.S.C. §2516, 2518(1)-(8)." 408 U.S. 46 (emphasis supplied). The respondents regard it as significant that this Court, in making the point that judicial approval to wiretap "may not be given except upon compliance with stringent conditions", specifically referred to Section 2516, and

the subsections of 2518 which include the other provisions here involved. In urging that the authorization requirement of §2516(1) is one of the "stringent conditions" that must precede judicial approval to wiretap, and that in essence it is constitutional, we rely upon the opinion of the Circuit Court in this case. There, Judge Sobeloff said:

> "Because of the delicate nature of the power to initiate electronic surveillance applications, the implementation was reserved to designated officials of a certain rank within the Justice Department." 469 F.2d at p. 527.

Restrictions upon the implementation of a power to lawfully intrude upon a constitutionally protected area necessarily become a definitive part of that power. Judge Sobeloff crystalized this reasoning later in the opinion when he said:

> "... By making an official subject to the 'political process' publicly responsible for each and every wiretap, Congress sought to provide the individual with yet another safeguard to insure that the awesome power of electronic surveillance be exercised with circumspection." 469 F.2d at p. 528.

The Fifth Circuit case of *United States v. Robinson*, 468 F.2d 189 (5th Cir. 1972), was the first one to confront the questions in the instant case upon identical facts. Its description of the "concerns" that Congress addressed itself to in enacting §2516(1) is fully in accord with the expressions of Judge Sobeloff. The Court, after noting the portion of Senate Report 1097 dealing with §2516 (supra), said:

> "By expressing its intention that only 'a publicly responsible official subject to the political process' could initiate a wiretap application, Congress wanted to make certain that every such matter

would have the *personal* attention of an individual appointed by the President and confirmed by the Senate. Its reasoning was that this narrow limitation to top department officials would (1) establish a unitary policy in the use of the awesome power conferred, and (2) require that power to be exercised with circumspection reenforced by ready identifiability of he who was responsible for its use, thus maximizing the guarantee that abuses would not occur." 468 F.2d at p. 192. (Footnotes omitted.)

District Judge Miller in *Focarile, supra,* reached the identical conclusions about the exalted importance of 2516(1) in the legislative scheme of Title III, and he additionally perceived the inter-relationship of the provisions of 2518(1)(a) and (4)(d) to 2516(1):

"Placement of the authority to make the decision of whether or not to authorize an application for a wiretap in the highest level of government and in a publicly responsible official subject to the political process was accomplished by the specific language of §2516(1) which had been suggested by the Justice Department in 1961 and which was included in the major subsequent legislative proposals. It was realized, however, as time went on that §2516(1) dealt only with the *fact of authorization* of the application. As has been seen, subsequent proposals, bit by bit, added the requirement that *the person who actually authorized* the application *must be made known* to the judge to whom the application was submitted and to those others to whom the contents of his order would be disclosed (See §2518(4)(d), §2518(8)(d) and §2519(1)(f)). Knowledge by the judge, by the persons to whom the contents of the order would ultimately be disclosed, and Congress and the public as a whole through the Reports of the Director of the Adminis-

trative Office of the United States Courts provided for in §2519(3) were deemed to be necessary and appropriate to allow those concerned and interested the opportunity to fix the rresponsibility for the fact of the authorization of the application in a specific and identifiable person who is subject to the political process.

"The statutory scheme therefore sets up a two-step process. First, the application for the wiretap must be authorized by the Attorney General or by an Assistant Attorney General specifically granted authority to act by the Attorney General. Second, the identity of the person who authorized the application must be made known to the judge acting on the application and ultimately, through his order, to any person who is a party to a proceeding in which the contents of any intercepted communication or evidence derived therefrom are offered in evidence or otherwise disclosed in court. These two requirements are equally important in the legislative scheme. If the only important fact were that one of the persons given the power to act by §2516(1) had in fact authorized the application, it would not have been necessary to add the additional provisions of §2518 to require the identity of the acting official to be set forth in the application and order." 340 F. Supp. at pp. 1056, 1057. (Footnote omitted.)

The Ninth Circuit, in a more terse fashion stated the principle as follows:

"In sum, we hold that the identification requirements of §2518(1)(a) and (4)(d) complement the authorization requirement of §2516(1). Without the former, the latter would be meaningless. . . ." *United States v. Chavez*, 478 F.2d 512, 517 (9th Cir. 1973).

The authorization requirement (§2516(1)) is central to the Fourth Amendment protections in Title III; and is

not, as the Government claims, a peripheral provision, separable from "the constitutional interests at stake." (Pet's. brief p. 26) That this is so has been echoed again and again.[17] This was strongly emphasized by the Ninth Circuit in the opinion it rendered in the case of *United States v. King*, 478 F.2d 494 (9th Cir. 1973), where it was said:

> "The Act and its legislative history make clear the purpose of the authorization requirement. [§2516(1)] Congress was well aware of the grave threat to the privacy of every American that is posed by modern techniques of electronic surveillance. S. Rep. No. 1097, *quoted in* 1968 U.S. Code Cong. & Admin. News 2112, 2154. While recognizing the importance of wire tapping in combating organized crime, *id.* at 2157-60, Congress was concerned lest overzealous law enforcement officers rely excessively upon such techniques in lieu of less intrusive investigative procedures. In order to insure circumspection in their use, Congress erected the elaborate procedural requirements for the initiation of wire taps described above. *See id.* at 1285-96. It was seen as a significant safeguard for the general public that applications for an order to intercept wire or oral communications must be passed upon before they may be presented to a court by 'a publicly responsible official subject to the political process'—either

[17] A correct view of the matter is that the legislative history of Title III reveals that Congress attempted to achieve, ". . . a carefully controlled balance between preventing indiscriminate wiretapping, in order to protect the rights of privacy in wire communications, and the need on appropriate occasions to intercept such communications as an important aid to law enforcement. Section 2516(1) was included as a vital part of this balance." *United States v. Vasquez, supra* note 9, at p. 537.

the Attorney General or an Assistant Attorney General of the United States. *Id.* at 2185.

"In our opinion, the purpose of this provision was not merely to assure a uniform policy in applying for wiretaps. The Act prescribes a policy: that wire-taps are not to be overused, but are to be confined to those cases of serious crimes in which it is necessary to use them. The Congress wanted each application passed upon by one of the highest law enforcement officials in the government, and it named them. The Congress expected them to exercise judgment, personal judgment, before approving any application. Routine processing by subordinates was not to be the approach. More responsibility than that which devolves upon any department head in any bureaucracy, that is, ultimate responsibility for what his subordinates do, was required." 478 F.2d at p. 503.

B. The provisions of §§2515 and 2518(10)(a)(i) and (ii) of Title III clearly provide that suppression of the contents of the intercepted communication and evidence derived therefrom should be the remedy and sanction for violation of §2516(1) and §2518(1)(a) and (4)(d).

Assuming, as the Government claims, that the requirements of §2516(1), §2518(1)(a) and (4)(d) are not intrinsic to Fourth Amendment "values" or "concerns",[18] the conclusion that the Government argues for still cannot be reached. The desired end (of the Government's argument) is that this Court should not authorize the sanction imposed in this case by the lower courts.

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[18]But see part A, *supra.*

Though the underlying premise is many faceted,[19] the recurrent theme of the Government is that suppression is the remedy for violations of the Fourth Amendment, but not for the statutory ones here involved. To the extent that the Government's reliance is placed upon an analysis and interpretation of §2515 and the provisions of §2518(10)(a)(i)-(iii), the argument is unsupportable. The respondents find it an impossible undertaking to follow the reasoning of the Government in this respect (Pet's. brief 33-39). We meet the argument by directing atten-

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[19]The Government's arguments are:

I. The remedy provisions of Title III, namely §2515 and §2518(10)(a)(i)-(iii), do not require the suppression of evidence under the facts of this case, because the statute, "orders suppression as the remedy for violations of Fourth Amendment rights and ... does not provide suppression as a remedy for defective processing of applications to courts" (Pet's. brief p. 34). This argument is developed in the Pet's. brief at pp. 33-39 (Part 1B).

II. The exclusionary rule was established to remedy violations of constitutional rights. It was subsequently extended to vindicate certain statutory violations of constitutional magnitude or those involving fundamental personal rights. Suppression is not dictated in this case because the Government's violations of the statutory commands of the Title III "are not Fourth Amendment requirements ... [and] have no substantial bearing on the defendant's personal rights." (Pet's. brief p. 43). This argument is made in Pet's. brief at pp. 40-46 (Part 1C).

III. The Justice Department procedures and policies that produced the statutory violations in this case (and many others) have now been amended. The Government is now following the law and will not breach it again. The sanctions imposed by the lower courts in this case should not be ratified because: (a) "there is no need for 'deterrence' against resort to similar procedures"; and (b) suppression here would require the exclusion of probative evidence in a large number of other criminal cases. (Pet's. brief p. 47). This argument is set forth in Pet's. brief at pages 46-50 (Part 1D).

tion to the clear and unambiguous language of the statutes:

18 U.S.C. §2515 provides:

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

18 U.S.C. §2518(10)(a) provides, in part:

"(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter."

To make the argument the Government does, is to assert that these provisions don't mean what they say, or don't say what they mean. The Legislative History supports the clear common sense meaning of these provisions. The Senate report dealing with Section 2515 provides, in pertinent part, as follows:

> "Section 2515 of the new chapter imposes an evidentiary sanction to compel compliance with the other prohibitions of the chapter. It provides that intercepted wire or oral communications or evidence derived therefrom may not be received in evidence in any proceeding before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a state, or a political subdivision of a state, where the disclosure of that information would be in violation of this chapter. The provision must, of course, be read in light of section 2518(10)(a) discussed below, which defines the class entitled to make a motion to suppress. It largely reflects existing law. It applies to suppress evidence directly (*Nardone v. United States*, 58 S.Ct. 275, 302 U.S. 379 (1937)) or indirectly obtained in violation of the chapter. (*Nardone v. United States*, 60 S.Ct. 266, 308 U.S. 338 (1939).) . . ." S. Rep. No. 1097, 90th Cong., 2d Sess., *United States Code Congressional and Administrative News*, Vol. 2 (1968), 2184, 2185.

Distilled of surrounding language, the report says that §2515 "applies to suppress evidence directly . . . or indirectly obtained in violation of the chapter." *Gelbard v. United States*, *supra*, also gives direction on the subject:

> "Indeed, the congressional findings articulate clearly the intent to utilize the evidentiary prohibition of

§2515 to enforce the limitations imposed by Title III upon wiretapping and electronic surveillance. . . .

* * *

"And the Senate report, like the congressional findings, specifically addressed itself to the enforcement, by means of §2515, of the limitations upon invasions of individual privacy. . . .

* * *

"Section 2515 is thus central to the legislative scheme. Its importance as a protection for 'the victim of an unlawful invasion of privacy' could not be more clear." 408 U.S. 48-50 (Footnotes omitted)

The same Senate report says in reference to §2518(10)(a)

"Paragraph (10)(a) provides that any aggrieved persons, as defined in section 2510(11), discussed above, in any trial, hearing or other proceeding in or before any court, department, officer, agency, regulating body or other authority of the United States, a state, or a political subdivision of a state may make a motion to suppress the contents of any intercepted wire or oral communication or evidence derived therefrom. This provision must be read in connection with sections 2515 and 2517, discussed above, which it limits. It provides the remedy for the right created by section 2515." S. Rep. No. 1097, 90th Cong. 2d Sess., *United States Code Congressional and Administrative News*, Vol. 2 (1968), 2195.

Perhaps the clearest exposition of the meaning of §2515 and the provisions of 2518(10)(a) is found in the language of Chief Judge Bazelon, when, speaking for the Court (District of Columbia Circuit) in the case of *In Re Evans*, 452 F.2d 1239 (D.C. Cir. 1971), 146 U.S. App. D.C. 310, he said:

"First, §2515 describes in the most sweeping possible terms a prohibition against the use of

evidence tainted by an unlawful wiretap. But the section gives no indication of a specific remedy by which this prohibition is to be enforced. Viewed as a whole, however, the Omnibus Crime Control Act does provide such a remedy—the motion to suppress authorized by §2518(10)(a). Moreover, the committee report which accompanied the Act explicitly indicated the committee's expectation that §2518(10)(a) would be read as the remedy for, and hence limitation on, the 'right' created by §2515." 452 F.2d 1243-1244 (Footnote omitted).

In the instant case Judge Miller of the District Court, felt that it was not necessary to decide the question raised under §2516(1). *Focarile, supra.* He ruled that, "the motions to suppress must be granted because both the application for the wiretap and the order of the issuing judge state that Will Wilson, an Assistant Attorney General specially designated for the purpose by the Attorney General had been the one to authorize the submission of the application to the Court" 340 F.Supp. at p. 1059. Thus his ultimate ruling of suppression was solidly and singularly put upon the violations of §2518(1)(a) and (4)(d).[20] The basis for suppression, in his view, existed solely in the specific provisions of

[20]This is abundantly clear by the following passage:

"If the application and the order of court granting leave to institute the wiretap were allowed to stand, in spite of the fact that they did not correctly identify the person authorizing the application as required by the statute, one-half of the two-prong statutory scheme would be rendered a nullity. Such a gross error cannot be relegated to oblivion by terming it a 'mere technicality' as the Assistant United States Attorney does in his understandable last-ditch effort to preserve his months of work on this case. The statute imposes an overall ban on the interception and disclosure of wire or oral communications, but, under a system of strict

§2518(10)(a)(ii):

> "Section 2518(10)(a)(ii) provides that a motion to suppress may be granted if the order '. . . is insufficient on its face.' If the order in this case had failed to identify the person who authorized the application, it would have been defective and insufficient on its face and certainly would have justified suppression of any evidence derived from the wiretap. In the view of this court, the misidentification of the person authorizing the application is no more a 'technicality' than a failure to identify anyone, and similarly requires the granting of the motions to suppress.
>
> "The application and order relating to the extension of the wiretap are defective for the same reasons as the original application and order." *id.* at p. 1060.

The Circuit Court in this case, as noted earlier, focused primarily on the violation of §2516(1), and found that this in combination with the violations of the identification requirements of 2518(1)(a) and (4)(d) constituted "defects" that "go to the very heart of Title III." *Giordano, supra* at p. 531. It was obvious to the Circuit Court that the sanction unequivocally established in §2515, implemented by the provisions of §2518(10)(a)(i) & (ii), demanded suppression in this case. In sum, the Court said:

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judicial supervision, it authorizes interception under certain circumstances in connection with the investigation of particularized serious crimes by certain law enforcement officers. As was stated in *United States v. Cox, supra*, 'If the officers have not complied with the strict requirements of the statute, the contents of the communication or evidence which stems from it can be suppressed. . . .' 449 F.2d at 684." 340 F. Supp. 1060.

> "If the order had failed to identify the person who authorized the application, it would have been insufficient on its face, requiring suppression of the evidence. Here, however, there was no authorization at all, which is the equivalent of failing to identify anyone. Furthermore, the pattern of the Government's behavior in ignoring statutory requirement after statutory requirement necessarily leads to our determination that any communications derived from the wiretap were unlawfully intercepted and therefore properly suppressed." 469 F.2d 531.

The Government meets the reasoning of the courts below, as it is premised on §2518(10)(a)(ii) (suppression on the grounds that the order under which the interceptions were made is insufficient on its face), by arguing that an order is not insufficient, if the defect is discovered by looking behind its face (Pet's. brief p. 37). An invalid order may facially appear to be valid; or an insufficient order may appear on its face to be sufficient. Is it any less invalid or insufficient because it appears not to be so? The closest analogy that can be drawn is in search warrant procedures and the requirements of affidavits supporting them. Rule 41(c), Federal Rules of Criminal Procedure[21] provides that a warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant; and that the warrant shall state the grounds of probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. The provisions of §2518(1) prescribe counterpart requirements, with additional "protective pro-

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[21] Prescribed by this Court and made effective after submission to Congress. *Rea v. United States,* 350 U.S. 214, 217 (1956).

cedures" in respect to wiretapping under Title III—notable are the identification requirements. Nonetheless, the remedy and sanction portions of the search and seizure rule (41(e)) provide that a ground for suppression is that "(2) the warrant is insufficient on its face." It has been consistently held that false facts in a warrant application as to the identity of the affiant will vitiate the warrant and the search. *King v. United States*, 282 F.2d 398, 400, n.4 (4th Cir., 1960); *United States v. Upshaw*, 448 F.2d 1218, 1221 (5th Cir. 1971) (and especially see cases and authorities therein cited at n.3); *United States v. Carignan*, 286 F.Supp. 284 (D. Mass. 1967); *United States ex rel. Pugh v. Pate*, 401 F.2d 6 (7th Cir. 1968). The provisions of §2518(10)(a)(ii) are remarkably similar to Rule 41(e)(2) in that both require suppression where the authority for the intrusion, warrant to search in one case and interception order in the other, is "insufficient on its face." Purged of its erroneous and "misleading" statements concerning the identification of the official authorizing the application, the order was "insufficient on its face." We do not see how the Government can claim otherwise.

Similarly, we cannot here depart from the other predicate for suppression asserted by the Circuit Court, i.e., that "the communication was unlawfully intercepted" (§2518(10)(a)(i)); and that the contents and its derivatives must be suppressed in the setting of the multiple violations of Title III. Many of the other courts that have reached a similar result on identical facts have not been as expansive or as articulate in their reasoning. See for example, *United States v. Baldassari*, 338 F.Supp. 904, 907 (M.D. Pa., 1972); *United States v. Cihal, supra*, 336 F.Supp. 261, 267 (W.D. Pa., 1972). This gives no cause for wonderment, because the clear application of §2515 and §2518(10)(a) need not be belabored. When Government officials attempt to disclose information derived from wire communications intercepted without

obtaining the authorization required by §§2516 and 2518(1) through (8), the evidentiary sanctions of §2515 become operative. *In re Egan*, 450 F.2d 199, 218 (3rd Cir. 1971) (Rosenn, Circuit Judge, concurring).

C. The courts below did not invoke a judicially created exclusionary rule in reaching the result of this case, for Title III is self-executing in terms of remedy and sanction by virtue of §2515 and §2518(10(a)(i) & (ii).

Ignoring the provisions of §2515 and 2518(10)(a), which together mandate suppression in this case, the Government next argues that the "judicially created exclusionary rule" should not be applied because there was no infringement of any substantial right of the defendants. The respondents are not aware that any "judicially created" exclusionary rule was invoked by the Courts below. A reading of the argument offered by the Government in support of this contention makes it clear why the Government transforms the statutory sanction, above noted, into a judicial one. By doing so, the Government can readily fall back on its overworked claim that the statutory requirements breached in this case are not rights protected by the Fourth Amendment. The Government is persistent in its claim that the statutory rights created by 2516(1) and 2518(1)(a) & (4)(d) are only procedural provisions, which have no bearing on the defendant's personal rights. Upon this weak foundation the Government builds its argument: (1) the exclusionary rule was established to remedy violations of constitutional rights; (2) it was subsequently extended to certain statutory violations under the supervisory power of this Court. (Pet's. Br. p. 40) Only in cases involving a statutory violation of constitutional, or near constitutional magnitude has this Court found an overriding

public policy warranting suppression, argues the Government. For this proposition the Government recites two general categories: first, those related to Fourth Amendment rights of privacy, exemplified by the interpretation of Section 605 of the Communications Act of 1934 (*Nardone v. United States*, 302 U.S. 379 (1937) & 308 U.S. 338 (1938)); the principle of *Katz v. United States*, *supra*; and the instances where there have been violations of 18 U.S.C. 3109 (*Miller v. United States*, 357 U.S. 301 (1958); *Sabbath v. United States*, 391 U.S. 585 (1968)); and secondly, "those reflecting Fifth and Sixth Amendment values", as illustrated by *McNabb v. United States*, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957) (which involved the violation of a Federal Rule of Criminal Procedure); and *Miranda v. Arizona*, 384 U.S. 436 (1966) (Pet's. Br. pp. 42-43 n.30). The distinguishing factor between the cases the Government uses as illustrations in the two categories noted above, and the instant case is that here, Title III is self-executing as to remedy. In the cases cited by the Government, this Court was obliged to apply the exclusionary rule in the absence of an explicit remedy in the statutory scheme creating the right. Congress has declared in Section 2515 and Section 2518(10)(a) what the penalty should be for the statutory violations existing in this case. There was no necessity for the courts below to fashion a remedy. They utilized the one that was provided in the statute.

The Government, having established argumentatively to its own satisfaction that the violations of statutory requirements, such as the ones here involved, are not of constitutional magnitude—not warranting suppression—then embarks upon a review of the authorization and identification procedures in this case to prove its point. This argument is typically circular. It says that failures in the Department's preliminary screening of the applica-

tions are irrelevant, so far as the defendant's rights are concerned. Even so, the Government continues, the screening and review were comprehensive. (Pet's. Br. p. 44-46) Extensive as it may have been, and the respondents concede that it was, it nonetheless was not that demanded by the statute. The statute does not give the Government leave to provide substitute authorization and identification methods, no matter how comprehensive. When the Executive Branch of Government does something different than the Legislative Branch mandates, the Executive arrogates an authority it does not have. The danger always is, as shown by the record in this case, that there will be a dilution of the standards prescribed by Congress. It can only be said in such instances that the Executive Branch is either rewriting legislation or is ignoring the congressional will. This is administrative legislation—intolerable under the constitutional doctrine of separation of powers.

D. The remedy provisions of Title III that mandate suppression of evidence in this case are not dependent or conditioned upon a later correction of the statutory violations nor upon the doctrine of retroactivity nor upon the number of prosecutions that cannot be maintained.

Finally, in the last section of its argument addressed to the theme that "suppression is a drastic remedy", the Government ties together what it calls, "still other considerations." In order, they are: (1) the Department of Justice changed the procedures under attack more than a year after the transgressions, thus, there is no need for deterrence; (2) suppression would result in the exclusion of basic and critical evidence in a large number

of criminal cases. (Pet's. Br. p. 47) To validate the first part of this argument, the Government again suggests (by a reference to *Terry v. Ohio*, 392 U.S. 1 (1968); *Mapp v. Ohio*, 367 U.S. 643 (1961); and *Linkletter v. Walker*, 381 U.S. 618 (1965), that in this case we are dealing with the judicially created exclusionary rule. To the Government the cases it cites hold that the principal justification for the exclusionary rule is that suppression is the only effective way to deter the improper conduct in question.[22] Continuing this case because the practices that caused the violations have been amended and will not be repeated. This position, as noted, proceeds from the faulty premise that the suppression rulings by the courts below were an invocation of the "exclusionary rule". This, as we have pointed out, again and again, simply is not so. We could not have stated the position of the respondents more cogently in refutation of the "deterrence" and the "exclusionary rule" arguments of the Government, than was said in the case of *United States v. Wierzbicki, supra*, where the Government made similar arguments in a similar case:

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[22]We do not feel it appropriate to debate the question of whether deterrence is or is not the principal justification for the exclusionary rule. We only note what Justice Frankfurter said, in speaking for the majority of this Court, in *Jones v. United States*, 362 U.S. 257 (1960):

"The restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and the security of property. They are not exclusionary provisions against the admission of kinds of evidence deemed inherently unreliable or prejudicial. The exclusion in federal trials of evidence otherwise competent but gathered by federal officials in violation of the Fourth Amendment is a means for making effective the protection of privacy." 362 U.S. at p. 261.

"The Government also argues that, even assuming that the authorizations were improper, the Court should not invoke the 'drastic remedy' of suppression. It claims that no real deterrent effect would result from suppression, since the object of the Government was at all times to comply with the statutory requirements. *However, we are not dealing with the Court-fashioned 'exclusionary rule' involved in Fourth Amendment cases. Weeks v. United States,* 232 U.S. 383 (1914); *Katz v. United States,* 389 U.S. 347 (1967); *Berger v. New York,* 388 U.S. 41 (1966). *What we have here is a separate statutory requirement which this Court has no authority to ignore.* Sec. 2518(10)(a); Sec. 2515." 12 Cr.L. 2075. (Emphasis supplied)

The Government next says that this Court "[i]n exercising its power to determine whether to impose the sanction of the exclusion of evidence in this case" (Pet's. Br. p. 48) should draw upon the factors illuminated in its retroactivity decisions, citing for this proposition the cases of *Linkletter v. Walker, supra;* Stovall v. Denno, 388 U.S. 293 (1967); *Desist v. United States,* 394 U.S. 244 (1969); and *Fuller v. Alaska,* 393 U.S. 80 (1968). Once more the Government makes an appeal that is based upon the faulty assumption that the "court-fashioned 'exclusionary rule' " is involved in this case. *United States v. Wierzbicki, supra.* The doctrine of retroactivity[23] espoused by

[23]"Retroactivity" as a doctrine has a precise meaning which by definition renders it inapplicable to the facts in this case. In retroactivity cases, a party whose rights were finally concluded, adjudicated, or exhausted by an adverse rule or law seeks to have a later judicial change in the law applied retroactively to beneficially alter the result in his case. In the present case the petitioners asserted in the court of first instance that their rights had been violated by the conduct of the Government in disregard of

the Government is accommodated to this "exclusionary rule." The petitioners respectfully say that this Court cannot ignore that the remedy and sanction applied in this case exist as an integral part of Title III. This Court must, as the lower ones did, take the Act as it is. The Government invites this Court to exercise a power that it does not have.

The very last argument that the Government makes on this subject is that there was reliance by law enforcement authorities on the former procedures, resulting in a number of pending criminal cases and that if the judgment of the lower court is not reversed the administration of justice will be seriously affected. This argument too depends on the retroactivity doctrine for its vitality.[24] Because the underlying premises are inapplicable in this case, the conclusion must be rejected. This, notwithstanding, one thing further is to be said in answer to the notion that if this case is not reversed then many other criminal cases cannot be prosecuted. In *State v.*

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authorization and identification requirements in Title III; and that, accordingly, they were entitled under the Act to have the evidence gathered by the wiretap and derived from it suppressed. The first court agreed and granted them the appropriate relief, as did the Circuit Court, upon direct appeal. At every level of this ongoing, viable litigation the petitioners have asserted the same claim. At no point has the matter been adjudicated against them.

[24]The syllogism is as follows: A. In *Linkletter v. Walker, supra,* it was held that this Court has the power to decide which rulings (of even Constitutional dimensions) should be applied retroactively. B. In *Stovall v. Denno, supra,* this Court enumerated the controlling criteria in making this judgment, two of which are: "(b) the extent of the reliance by law enforcement authorities on the old standards and (c) the effect on the administration of justice of a retroactive application of the new standards." (Pet's. Br. p. 49)

Carluccio, 61 N.J. 178, 280 A.2d 853 (1971), the Court said:

> "Our system of justice is not disgraced by the acquittal of a defendant because illegally seized evidence cannot be used against him. I believe our system is ennobled by this rule. Judges uplift our system to the degree in which constitutional rights are enforced in a full and sympathetic spirit. Nor is the public uniformly dismayed by the discharge of an accused when the law requires that result." 280 A.2d at p. 857.

II.

THE STRINGENT REQUIREMENTS OF TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968 WERE NOT ADHERED TO BY THE GOVERNMENT IN OBTAINING THE WIRE INTERCEPTION ORDERS HERE IN QUESTION.

The Government's Petition for a Writ of Certiorari correctly sets forth the second circuit cases[25] which are in conflict with the fourth circuit's opinion in the instant case.[26] The *Pisacano* case is factually more similar to this case than is the *Becker* case and, in fact, *Becker* is distinguishable so much so that it may stand alone from *Giordano* and *Pisacano* in a discussion of the §2516(1) requirements of 18 U.S.C. In *Becker*, the court found that the original application for a wiretap order had been personally approved by the then Attorney General of the United States, John N. Mitchell. The memorandum from the Attorney General to the Assistant Attorney General,

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[25] *United States v. Pisacano*, 459 F.2d 259 (2d Cir. 1972); and *United States v. Becker*, 461 F.2d 230 (2d Cir. 1972).

[26] *United States v. Giordano, supra* note 15.

Will Wilson, bore the Attorney General's initials, but those initials had been placed there by the Attorney General himself, which, strange as it may seem, is an exception to the norm. In this memorandum, the Assistant Attorney General, Wilson, was purportedly specially designated pursuant to 18 U.S.C. §2516 to authorize the attorney in charge of the Organized Crime and Racketeering Section of the Department of Justice to apply to the District Court for an order permitting the interception of wire communications on two specific telephones. In a manner similar to the manner in which the *Pisacano* and *Giordano* authorizations were handled, the actual authorization in *Becker* was issued not by Will Wilson, the Assistant Attorney General, but by Henry E. Petersen, then Deputy Assistant Attorney General, acting with Wilson's prior authority, expressly permitting him to sign Wilson's name to such authorizations. In *Pisacano* and *Giordano*, the original applications were approved not by the Attorney General himself, nor by an Assistant Attorney General specially designated, but by the Executive Assistant to Attorney General Mitchell, Mr. Sol Lindenbaum. (App. 96-97). In response to each application in these cases, the Attorney General's initials were placed on a memorandum to Assistant Attorney General Will Wilson, by Mr. Lindenbaum "specially designating" Mr. Wilson to authorize the appropriate field representative to apply for a wire communications interception order. As in *Becker*, the "Will Wilson letters" were neither signed nor reviewed by Wilson, but were actually issued by Petersen in *Pisacano*, and Deputy Assistant Attorney General Harold P. Shapiro in *Giordano*. In *Pisacano*, there were similarly two extension orders, each of which was personally authorized by Attorney General Mitchell, just as the wiretap and pen register extension

orders in *Giordano* were so authorized. However, these authorizations took the form of the memorandum to Will Wilson in the *Becker* case (App. 98-99). Such a memorandum purportedly specially designated "Assistant Attorney General Wilson to issue an authorization". It is undisputed, however, as in all the cases thus far mentioned, that Wilson did not issue such extension authorizations but that they each were issued by a Deputy Assistant Attorney General.

In *Giordano*, the sworn application of Assistant United States Attorney Francis S. Brocato for an order authorizing the interception of wire communications sets forth to Chief Judge Edward S. Northrop of the United States District Court for the District of Maryland, the fact that the application has been properly authorized by a specially designated Assistant Attorney General and further identifies the purported specially designated Assistant Attorney General as the Honorable Will Wilson. Annexed to the application of Mr. Brocato were the "Will Wilson letter" to Mr. Brocato, and the affidavits of two special agents of the Bureau of Narcotics and Dangerous Drugs (BNDD). (App. 21-48). Judge Northrop's subsequent order mistakenly stated that the authorizing party was, in fact, Assistant Attorney General Will Wilson. (App. 49-51). It is also evident that Chief Judge Northrop was totally unaware that the original authorization was neither reviewed nor issued by the Attorney General of the United States nor any specially designated Assistant United States Attorney, but by the Attorney General's Executive Assistant. The order was valid for a twenty-one day period after which it would expire. On the twenty-first day, the Assistant United States Attorney filed an application for an extension of the October 16, 1970 order (App. 60-81), which included a second "Will Wilson letter" and an affidavit from a supervising agent of

the Bureau of Narcotics and Dangerous Drugs. The second application likewise incorrectly states that the Attorney General has "specially designated" Assistant Attorney General Will Wilson to authorize the application in question. The affidavit accompanying the application for a wiretap extension order recited at length the fruits of the defective October 16 order as a substantial portion of the underlying reasons for granting the extension for an additional period of time. On November 6, Chief Judge Northrop was again duped into passing a defective wiretap order, wherein he attempted to comply with the requirements of §2518(4)(d) of 18 U.S.C.[27] by stating that the application was authorized by the specially designated Assistant Attorney General, Will Wilson.

As is stated in the fourth circuit opinion of the late Senior Circuit Judge Sobeloff, the issue presented in this case is "... the extent to which the Government must adhere to the letter of that statutory scheme (Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 et seq.) in authorizing applications and obtaining orders permitting the interception of wire communications." *United States v. Giordano, supra,* at p. 523. Defendants take issue with the Government's initial strained assertion that it "... complied with the provisions ... of Title III." (Pet's. Brief, p. 52). Judge Sobeloff's capsulation of the issue proves this statement to be utterly beyond the real facts at hand.

The order authorizing the application for the interception of wire communications was not properly

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[27] 18 U.S.C. §2518(4)(d) provides in pertinent part:

"Each order authorizing or approving the interception of any wire or oral communication shall specify:

(d) the identity * * * of the person authorizing the application; * * *"

authorized in accordance with §2516(1) of 18 U.S.C. and the identity of the person authorizing the application was neither made known to Chief Judge Northrop nor did his orders (including the November 6, 1970 extension order) correctly identify the persons authorizing either the first or second applications.

A. The wire communications interception order issued by Chief Judge Northrop was defective in that the application for such order was not validly authorized.

Section 2516(1) of Title 18 U.S.C. provides in pertinent part:

> "The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with Section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications . . . ."

That the Government failed to comply with the provisions of this section is evident from the facts, recited above, and contained in the affidavits of Sol Lindenbaum (App. 96-97), Harold P. Shapiro (App. 100-101) and the pertinent parts of the transcript of the hearing before District Judge James R. Miller on Defendants' Supplemental Motion to Suppress (App. 102-107).

The Government concedes that Mr. Lindenbaum alone authorized and issued the memorandum of approval for the initial application (App. 98) and that he placed thereon the Attorney General's initials. The procedures followed in this case, as set forth by Judge Sobeloff, included a request for authorization by the Director of the Bureau of Narcotics, and subsequent review and

favorable recommendation of this application by the Deputy Chief and Chief of the Organized Crime and Racketeering Section of the Department of Justice and the Deputy Assistant Attorney General. The Attorney General never delegated his authority in this regard (App. 96, 103, 105); accordingly, all applications for wiretap authorizations under §2516 were referred to the Attorney General. When the October 16, 1970 application was submitted, the Attorney General was absent from Washington and the application was reviewed by his Executive Assistant, Mr. Lindenbaum. According to the Lindenbaum affidavit, Lindenbaum reviewed the request for approval and concluded from his knowledge of the Attorney General's previous actions in similar matters that the Attorney General would favor granting the request (although in the same defective manner theretofore employed, contrary to §§2516 and 2518). Lindenbaum therefore acted, in the Attorney General's absence, to approve the request by signing the Attorney General's initials to a memorandum to Assistant Attorney General Will Wilson, designating him to authorize a tap on Giordano's telephone.

In plain view of these facts, the Government again advances what has been characterized as its "alter ego theory", seeking to convince this Court, although unsuccessful below, that compliance with alleged policy objectives of responsibility for wiretap authorizations is full compliance with the law. In urging on the Court its contention in this regard, it seeks to sweep under the rug of confusion its hazy notion that Congress intended to allow wiretap authorizations to be issued within the Attorney General's policy guidelines and created, as a check on the issuance of such privacy invading authorizations, the sheep in wolf's clothing of holding the Attorney General responsible for all such actions. It is

further suggested that by in effect, allowing delegation of duties in the manner allowed by 28 U.S.C. §510,[28] while prohibiting the companion delegation of responsibility, the §2516(1) alleged primary legislative purpose—that a line of responsibility lead to a clearly identifiable person—is met.

In responding to the "alter ego theory" advanced below, Judge Sobeloff supplies a thorough analysis of the pertinent legislative history of §2516 itself. Indeed, it was on the specific recommendation of the Assistant Attorney General of the Criminal Division of the Department, Herbert J. Miller, himself, that language allowing authorizations to apply for written orders to be issued by ". . . any Assistant Attorney General of the Department of Justice . . ." (in addition to the Attorney General or an Assistant Attorney General specially designated by him) was removed from the proposed legislation. *United States v. Giordano, supra,* at p. 526-527. The Government's basic responsibility and centralization of control argument here advanced was summarily rejected by Mr. Miller and ultimately by Congress, who, in response to Mr. Miller's suggestion that such power of authorization be vested only in the "Attorney General and any Assistant Attorney General whom he may designate" revised the legislation to its present form, as it exists in §2516. In his testimony Mr. Miller further indicated:

> " '*This would give greater assurance of a responsible executive determination of the need and*

[28]28 U.S.C. §510 provides:

> "The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General."

justifiability of each interception.' Id. (Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, Wiretapping and Eavesdropping Legislation, 87th Congress, First Session (May 9, 10, 11, 12, 196(1)) at 356." (Emphasis added) *Id.* at p. 527.

Although the Government suggests that delegation to the Executive Assistant of the Attorney General would satisfy the announced objectives of Mr. Miller's testimony, the above quoted passage clearly indicates the contrary; it was Mr. Miller's suggestion, later adopted by Congress, that each authorization be the subject of a responsible executive determination, a quality which is lost if delegated to an office assistant.

In seeking to properly interpret §2516, the vast majority of well reasoned cases, including *United States v. Giordano, supra,* seek guidance from Senate Report 1097, dated April 29, 1968, which accompanied Senate Bill 917 (containing §2516 of 18 U.S.C.), found in *United States Code Congressional and Administrative News, 90th Congress, Second Session,* Vol. 2 (1968). See *United States v. King, supra.* But see, also, *United States v. Pisacano,* 459 F.2d 259, 262 and 264 (2d Cir. 1972).

Senate Report 1097 states, inter alia, in referring to §2516, that it is the Congressional intent in employing the specific terminology used, to limit the initiation of a wiretap to "a publicly responsible official, subject to the political process." As pointed out by Judge Sobeloff below, Mr. Lindenbaum is not such an official subject to the political process.

In *Pisacano,* Judge Friendly interprets the language of Senate Report 1097 to require "responsibility" to remain in such an official regardless of what member of the Department of Justice issues the particular interception

order in question. To this "responsibility" theory, likewise espoused by the Government, Respondents reply that it ignores the complete legislative history, discussed above and in *Giordano,* and it ignores some of the specific limiting language of §2516 itself. In its argument here, the Government is also reaching out to frantically incorporate a more general, permissive statute into §2516(1); namely, 28 U.S.C. §510.[29] That latter section was in existence prior to the enactment of 18 U.S.C. §2516 and generally authorizes the Attorney General to delegate his functions to any other officer, employee or agency of the Department of Justice. Were this Court to adopt this outrageous theory so advanced, it would be abandoning all rules of statutory construction. Chief Judge Friendly, in *Pisacano,* suggests that the legislative history may well be doubtful in establishing the true intentions of Congress meant to be expressed in §2516. However, in order to reach the conclusion suggested by *Pisacano*, one must regard the statutory language ". . . or any Assistant Attorney General specially designated by the Attorney General . . ." (18 U.S.C. §2516(1)) as meaningless surplusage. For if the Attorney General may delegate his functions to any officer, employee, or agency of the Department of Justice, it must necessarily follow that he could designate any one of them for the function in question, a result in direct conflict with this language of §2516. The Congressional design, evidenced by the above quoted statutory terminology, would be thwarted. Additionally, Judge Sobeloff's observation of the result of such a conclusion is appropros:

"If we should accept the Government's reasoning, there can be no assurance that in some future case,

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[29] See footnote 28, *supra.*

if the particular wiretap authorization proved politically embarassing, the Attorney General would not then repudiate his 'Lindenbaum'. The Attorney General would always be able to say with the benefit of hindsight that the subordinate had betrayed his confidence, acted beyond the scope of his responsibility, and the actions taken were not those of an agent. The alter ego theory destroys the concept of establishing identifiable individual responsibility at a certain level of government." *United States v. Giordano,* supra, at pp. 528-529.

Finally, an argument similar in nature and scope was advanced by the Government in *United States v. Aquino,* 338 F. Supp. 1080 (E.D. Mich. S.D. 1972). In responding to that argument, that Court stated:

"In the Court's opinion, however, when Congress stated in Section 2516 that the power to authorize applications to a Federal judge was given to 'the Attorney General, or any Assistant Attorney General specially designated by the Attorney General', it excluded designation of or delegation to all other persons. It is a long recognized rule of statutory construction that where one statute contains a specific provision or direction, as does Section 2516, and another statute dealing with the same or similar subject matter contains a more general provision or direction, as that contained in Section 510 and the regulation enacted thereunder, the particular or specific provisions must control. 'Specific terms prevail over the general in the same or another statute which might otherwise be controlling'. *Fourco Glass Co. v. Transmirra Products Corp.,* 353 U.S. 222, 228-229, 77 S.Ct. 787, 791, 1 L.Ed.2d 786 (1957), *quoting Ginsberg & Sons v. Popkin,* 285 U.S. 204, 208, 52 S.Ct. 322, 76 L.Ed. 704 (1932). A related rule of construction holds

> that the enumeration of certain things in a statute implies the exclusion of all others. As was stated by the Supreme Court in *Continental Casualty Co. v. United States,* 314 U.S. 527, 533, 62 S.Ct. 393, 396, 86 L.Ed. 426 (1941): '[A] "legislative affirmative description" implies denial of the non-described powers.' Applying these rules to the statutes here under consideration, it can only be concluded that the specific language of Section 2516 must take precedence over the general provisions of Section 510 and that the express limitations in Section 2516 preclude any inclusion of persons not specifically mentioned. [Footnote omitted, referring to the *United States v. Robinson*[30] suggestion that if 28 U.S.C. Section 510 allows delegation of Section 2516 authorization functions, then statutory reference to "any Assistant Attorney General specially designated by the Attorney General" would have been surplusage.] *Only* the Attorney General or an Assistant Attorney General specially designated by the Attorney General may authorize an application to a Federal Judge for an order approving a wire interception." *Id.* at pp. 1082-83. (Emphasis in original).

In a desperate effort to locate some firm support for its contention that the Attorney General could have properly delegated the authorization function, the Government quotes from *United States v. Barnes,* 222 U.S. 513, 520, 56 L.Ed. 291, 32 S.Ct. 117 (1912), that where there is subsequent legislation upon a subject it carries with it an implication that the general rules are not superceded, but are to be applied in its enforcement, save as the contrary clearly appears. It is submitted that the

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[30]468 F.2d 189 (5th Cir. 1972) rehearing en banc granted; remanded for further hearing in 472 F.2d 973 (5th Cir. 1973).

language of §2516 clearly is exclusive in meaning, as argued above. Additionally, reliance on this language is misplaced; not only is §2516 contained in a different Title (Title 18) than §510 (Title 28), but also Congress was not reinforcing an existing wiretap statute which already contained the generally worded §510. No Congressional intention to permit general delegation of the authorization function can properly be read into the procedural statutory scheme when it clearly did not necessitate any special further limitation. The §2516 language is limiting in character, standing alone.[31]

It is inaccurate, misleading and inappropriate for the Government to suggest, as it does, that "some room must have been left to the Attorney General to delegate the authority to approve specific applications" (Pet's. Brief, p. 62) since §2516 was enacted "against the background of Sections 509 and 510"; §2516 does not prohibit delegation, but on the contrary, it expressly allows for it. Keeping in mind the avowed intent to confine such intrusive activity in "publicly responsible official(s) subject to the political process", Congress, recognizing the possibility that future proliferation of wiretap applications could easily result in the inundation of the Attorney General in a sea of such applications, provided for him to specially designate his Assistant Attorneys General, of whom there are nine. Thus, Congress did not prohibit delegation altogether, as the Government suggests must be the only alternative to a finding of the inapplicability of the general delegation statute, 28 U.S.C. §510. The Government's reasoning

[31]See *United States v. Mantello, supra* note 11, adopting the results and rationale of *United States v. King, supra* note 10, and *United States v. Giordano, supra* notes 15 and 26, and specifically rejecting *United States v. Pisacano, supra* note 25.

seeks to avoid the middle ground, which is in fact the reality, that Congress specified those few individuals in whom their intended limited delegation of the authorization function may be vested. Centralization of policy, centralization of responsibility and use of publicly responsible officials subject to the political process were all requisites, just as the Congressional limitation on the maximum number of individuals in whom the authorization function would be allowed to be placed. In short, the Government would here urge that the last two requirements be relaxed, attempting to convince the Court that responsibility is the crucial factor. Were the Court to adopt such a position, §2516 would, in effect, be judicially modified.

The Government next contends that delegation in this case should be sustained on a showing of "exigent circumstances". What the Government is really requesting is that the Attorney General be excused for failing to avail himself of the Congressional suggestion that he specially designate Assistant Attorneys General to carry out the authorization function. The loss of the alleged elusive and evanescent telephone conversations should lie squarely on the shoulders of the Attorney General who failed to exhibit the foresight of realizing that a request may be received by the Department of Justice at a time when he was unavailable and likewise when he had not yet specially designated an Assistant Attorney General to act, in accordance with the clear Congressional exclusionary mandate. Finally, the top legal official of the land should certainly have been aware of the illegality of an authorization emanating from his Executive Assistant, Lindenbaum, no matter how intimately involved he was with the functions of the Attorney General's office. Action by that individual on wiretap applications was simply unauthorized.

B. The authorization to make application for an order to intercept wire communications, the application for such order and the order itself are all defective in that the true identity of the person responsible for initiating the wire communications interception is missing from each document.

The original authorization to make application for an order to intercept wire communications (the "Will Wilson letter", App. 25-26) falsely stated that the Attorney General had carried out the statutorily permissive special designation of an Assistant Attorney General empowering him to authorize the application for an order to intercept wire communications. The "Will Wilson letter" misidentified not only its author but the actual origin of the authorization. The latter was issued, it was discovered, pursuant to a memorandum to "Will Wilson, Assistant Attorney General", purportedly bearing the initials of the Attorney General, dated likewise, October 16, 1970 (App. 98), but actually initialed by Deputy Assistant Attorney General Shapiro. The memorandum initiating the subsequent chain of events, collectively comprising the authorization to make the application for an interception order, was never reviewed by the Attorney General, but, instead, only by his Executive Assistant, Sol Lindenbaum (App. 96-97). The application (App. 21-48) was presented to Chief Judge Northrop by Assistant United States Attorney Brocato. The application recited all of the false statements of fact contained in the supporting documents, above mentioned, and these intentional misstatements were finally cast in bronze when wholly incorporated in the Court's order of even date (App. 49-51).

An identical factual situation was aptly called an "elaborate paper charade" in *United States v. King*,

supra, while at the same time, concluding that it was carried out for the purpose of deceiving the Congress and the Courts.

Section 2518(1)(a) of Title 18, United States Code, commands:

> "(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
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> "(a) the identity of the investigative or law enforcement officer making the application, *and the officer authorizing the application*;" (Emphasis added).

Section 2518(4)(d) repeats the mandate that the person exercising the §2516 authorization function be specifically identified:

> "(4) Each order authorizing or approving the interception of any wire or oral communication shall specify–
>
> * * * * *
>
> "(d) the identity of the agency authorized to intercept the communications, *and of the person authorizing the application*;" (Emphasis added).

In a red-faced attempt to calm the waves of embarassment thrust at it by the discovery of deceitful procedures utilized by the Attorney General's office in obtaining interception orders, the Government again advances an argument, similar to its §2516 argument, that the statutory directives of §2518(1)(a) and (4)(d) do not mean what they say. The Government is again trying to market its "responsibility" theory. The Government attempts to brush aside the glaring defects caused by

Lindenbaum's action in place of the Attorney General's, the Deputy Assistant Attorney General's action in place of the purported special designee's, and the resulting identification deficiencies of the application and order of Court, by casually suggesting that the papers containing these false facts, the very foundation of the intrusive wire interception order, were merely "imprecise". In effect, the Government again submits the argument that the spirit, if not the letter of the law, was met. On close analysis, such an argument should be self defeating. The Government first suggests that §2516(1) allows the Attorney General to designate one not included in the statutory language as a possible designee to authorize wiretaps, namely, Sol Lindenbaum, Executive Assistant to the Attorney General (a minor deviation since the Attorney General will, of course, assume full responsibility for his every act); next, the Government suggests that no matter who, in fact, authorized the interception, the person responsible, namely the Attorney General, is the authorizing official sought by §2518(1)(a) and (4)(d) (a second minor deviation) since this is what Congress intended anyway. The Government argues that since misidentification does not taint the Court's findings of probable cause and necessity, and thus does not lead to Fourth Amendment Constitutional defects, statutory defects should be overlooked.

While Defendants would concede that the Constitution establishes the minimum requirements to be met in obtaining a valid interception order, Congress does not necessarily adhere to minimum standards in enacting legislation. Non-constitutional considerations, as well, may help to mold legislation. The procedures adopted by the Attorney General must pass both Constitutional and statutory tests of compliance. Thus, it necessarily follows that adherence to minimum Constitutional standards may

not be sufficient to resist a motion to suppress evidence. Here, the Government urges that these deviations from the unambiguous statutory requirements be overlooked. Evidence of Judge Becker's foresight of such a potential rolling snowball, as exhibited in *United States v. Narducci*, 341 F. Supp. 1107, 1115 (E.D. Pa. 1972) and quoted with approval in *United States v. Giordano, supra*, is here pertinent:

> "As we view it, the necessity for strict compliance with the statute in a wiretap situation stems just as much from the precedent-setting example of condoning laxity which could lead to further laxity in years to come, with serious consequences to personal liberties, as from concern over the rights of the accused in a given case."

Defendants contend that in this area of conduct which is intrusive and which steals from individuals much of their right to privacy, Congress intended form to be as important as substance. As Judge Becker in *Narducci, supra*, observed, at p. 1114:

> "[T]he Government's contentions that Mr. Lindenbaum's role constitutes a fulfillment of statutory policy fail in a most significant respect. For, as we understand this unique area, Congress has made form as important as substance; Congress was concerned not just with the integrity of the internal Justice Department review of agency wiretap requests, but also with the identity and status of the person initiating the authorization to apply for court approval. While Congress conferred upon the Justice Department the *authority* to initiate the wiretap process, it is clear to us that it deemed *implementation* of that awesome power to be a matter of high national policy. Accordingly, the approval of Mr. Lindenbaum, not an official subject

to the 'political process', does not fill the congressional bill." (Emphasis in original).

Section 2518 twice commands, in subsections (1) and (4), that the identity of the authorizing party be given; identity of the authorizing person must be set forth in the report filed with the Administrative office and Congress. Much attention and effort seems to have been devoted to a matter which the Government contends is unimportant. See *United States v. Focarile, supra* at pp. 1054-55, for an analytical study of the conception and birth of the § 2518 identification requirements.

We are not unmindful of *United States v. Bobo*, 477 F.2d 974 (4th Cir. 1973); *United States v. Cox*, 462 F.2d 1293 (8th Cir. 1973); and *United States v. Becker*, 461 F.2d 230 (2d Cir. 1972), holding, in effect, that substance would prevail over form. Defendants submit that those respective courts were inclined to limit suppression of evidence to factual situations where the minimum Constitutional requirements were not met, and as a result, thwarted the additional Congressional designs to require further safeguards. Such a result amounts to a failure to give full recognition to the Congressional arm of our tripartite system, in a situation where the statutory directive passes Constitutional muster.

Lastly, it can hardly be seriously contended, as the Government attempts to do, that the so-called "paper charade" was not calculated to mislead the Court in considering wire interception applications. The memorandum initialed by Lindenbaum tracks the statute, instead of relating the true fact that the Attorney General had not reviewed the request for an authorization. Next, the "Will Wilson letter" tracks the statute instead of setting forth the genuine factual details of the identity of the authorization source. Clearly, these forms were created

for use in all subsequent wire interception requests so as to suggest, to the unwary, strict compliance with the Congressional mandate, certainly recognized by the Department of Justice prior to the exposure of this scheme of governmental trickery.

III.

THE APPLICATION FOR THE EXTENSION OF THE WIRE COMMUNICATIONS INTERCEPTION ORDER AND FOR THE EXTENSION OF THE PEN REGISTER ORDER WERE DEFECTIVE IN THAT THEY WERE BASED ON FACTS WHICH HAD BEEN OBTAINED PURSUANT TO A DEFECTIVE ORDER TO INTERCEPT WIRE COMMUNICATIONS.

In an attempt to salvage some evidence against the Defendants, obtained through wire communications interceptions and court authorized pen register techniques, the Government contends that, even although the affidavits in support of said extension orders are based almost exclusively on information obtained, directly or indirectly, as a result of wire communication interceptions conducted pursuant to the October 16, 1970 order of Chief Judge Northrop, the fruits of the extension orders are admissible and should not have been suppressed.

Judge Sobeloff, below, affirmed Judge Miller's decision to suppress evidence obtained under the interception orders of this case, stating that the Court of Appeals was "... suppressing the fruit of the wiretaps in these cases." *United States v. Giordano, supra,* at page 531. Judge Miller had found that the subsequent extension orders were not supported by sufficient showings of probable cause since information from a defective Title III wiretap was used to obtain them. *United States v. Focarile, supra,* at page 1041.

The Government contends that its applications for extension orders for the interception and for the pen register contained, indeed "restated", all facts which were set out in the affidavit for the original order. Such is not the case. (App. 66). In fact, the affidavits recited, at length, the content of various communications, intercepted pursuant to the original wire communications interception order of October 16, 1970; the affidavits failed to set out any of the facts contained in the prior supporting documents, annexed to the original application, other than by a casual reference thereto. Although the affidavits do recite that a sale was made from Defendant Giordano to an undercover agent, that lone fact does not in itself establish probable cause for the issuance of the wire interception and pen register orders in question; on the contrary, recital of facts pertaining to an alleged sale constitutes a clear showing of the effectiveness of other law enforcement techniques and the absence of a *need* for a wire interception order. In short, the applications for the extensions did not include all details that were required by §2518(1)(a) through (f), and accordingly, the extension orders were invalid.

In addition to the above defects, the application for the extension of the wire communications interception order was clearly defective as was the order itself, for failing to comply with the identification requirements of §2518(1) and (4). This is so even though the Government affidavits, produced in response to Defendants' Motion to Suppress, showed that the Attorney General, John N. Mitchell, had himself reviewed the request for an authorization and had himself initialed the usual type of memorandum to Assistant Attorney General Will Wilson. The affidavits clearly show that although such an authorization was approved, Will Wilson was never specially designated to actually issue authorizations;

additionally, as has come to be the usual procedure in issuing such authorizations, the authorization in question, was, in fact, not issued by Will Wilson but was instead issued by Deputy Assistant Attorney General Shapiro. The application of Assistant United States Attorney Brocato likewise failed to state the true identity of the authorizing person or officer but instead identified Will Wilson as having authorized the application for a wire communications interception order when in fact, Will Wilson had no knowledge of either the original application or this application for an extension. As was argued above, this is not compliance with §2518 of 18 U.S.C. and any evidence secured under such an order was properly suppressed. Such evidence was, at best, the "fruit of the poisonous tree" since no other basis was even submitted for the consideration of Chief Judge Northrop in granting either extension order. Cf. *Nardone v. United States*, 308 U.S. 338, 84 L.Ed. 307, 60 S.Ct. 266 (1939); *Ethridge v. United States*, 380 F.2d 804 (5th Cir. 1967). Accordingly, the Attorney General's alleged personal intervention did not purge all taints.

CONCLUSION

For the above stated reasons, the judgment of the Courts below, suppressing the evidence in these cases, should be affirmed.

Respectfully submitted,

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